Nordin Yusmadi bin Yusoff v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-09-60 OF 1995
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
18 JUNE 1997

Criminal Procedure *— Sentence — Youthful offender — Accused found guilty for offence carrying mandatory term of imprisonment — Accused was instead ordered to be detained at Henry Gurney School under the Juvenile Courts Act 1947 s 40 — Whether s 40 of the Act was applicable to cases where the offence carries a mandatory term of imprisonment — Whether judge justified in exercising discretion under s 40 — Juvenile Courts Act 1947 s 40*

The appellant was convicted by the sessions court of a statutory rape of an underage girl, an offence under s 376 of the Penal Code (FMS Cap 45) ('the Code'). The appellant was then 19 years old, a first offender and had pleaded guilty to the charge. After considering the circumstances of the case, the sessions judge ordered the appellant, presumably under s 40 of the Juvenile Courts Act 1947 ('the Act'), to be detained at the Henry Gurney School until he reached the age of 21 years. The Public Prosecutor, not satisfied with the sentence imposed on the appellant, appealed to the High Court. The appellant was released on 16 January 1995. On 27 November 1995, the appeal was heard. The judge allowed the appeal, set aside the order of the sessions court and imposed the mandatory minimum term of imprisonment of five years provided by s 376 of the Code. The imprisonment term was to take effect from 27 November 1995, which was after the appellant had served the order of detention. The judge was of the view that pursuant to the mandatory provision of s 376 of the Code, the sessions judge was wrong in law to impose any other sentence, and that s 40 of the Act was not applicable. The issue was whether the sessions judge was justified in exercising her discretion under s 40 of the Act.

Held, allowing the appeal:

The second limb of s 40 of the Act relates to any person as long as he is above 18 years and under 21 years at the date of the making of such order. Taking into consideration the facts of the present case on appeal, and since the appellant was 20 years old when he was charged in the sessions court, the second limb of s 40 of the Act was squarely applicable to him. Although a youth above the age of 18 can be sent to prison, in cases where the court is of the view that it would be undesirable to send him to prison, a sessions court or a magistrate of the first class is conferred with special and additional powers to act under the second limb of s 40 of the Act, and order such a youthful offender to be detained in a Henry Gurney School until he attained the age of 21 years, provided that at the time of the making of the order, he was between the ages of 18 years and below 21 years. Therefore, in the circumstances of this case, it was proper for the

learned sessions judge to act under the second limb of s 40 of the Act. It would be wrong to say that, in view of the mandatory nature of s 376 of the Code, s 40 of the Act is irrelevant. Thus, s 40 of the Act is relevant and applicable even in cases where sentences of imprisonment is mandatory, provided the circumstances of the case justify it.

In this case, the learned sessions judge was justified to exercise her discretion to act under s 40 of the Act and this discretion ought not to be disturbed (see pp 758G–I and 759A–G); *PP v Yap Huat Heng* [1985] 2 MLJ 414 distinguished.

Per curiam:

In imposing the five years' imprisonment to take effect after the appellant had served the order of detention, the appellant had, more or less, been imposed two sets of sentences from a conviction upon one charge, and the appellant had, therefore, 'suffered a greater punishment for an offence than was prescribed by law' prohibited by art 7 of the Federal Constitution (see pp 759I and 760A–B).

[Bahasa Malaysia summary

Perayu telah disabitkan oleh mahkamah sesyen atas rogol statutori seorang gadis di bawah umur, suatu kesalahan di bawah s 376 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut'). Perayu berumur 19 tahun pada masa itu, merupakan pesalah buat kali pertama dan telah mengaku salah kepada pertuduhan. Selepas mempertimbangkan keadaan-keadaan kes, hakim sesyen telah memerintahkan perayu ditahan di Sekolah Henry Gurney sehingga mencapai umur 21 tahun di bawah s 40 Akta Mahkamah Juvana 1947 ('Akta tersebut'). Pendakwa Raya, yang tidak puas hati dengan hukuman yang dikenakan ke atas perayu, telah merayu kepada Mahkamah Tinggi. Perayu dibebaskan pada 16 Januari 1995. Pada 27 November 1995, rayuan didengar. Hakim membenarkan rayuan, mengetepikan perintah mahkamah sesyen dan mengenakan hukuman pemenjaraan mandatori minima selama lima tahun yang diperuntukkan oleh s 376 Kanun tersebut. Hukuman pemenjaraan berkuatkuasa dari 27 November 1995, yang merupakan masa selepas perayu telah menjalani perintah tahanan. Hakim berpendapat bahawa menurut peruntukan mandatori s 376 Kanun tersebut, hakim sesyen adalah salah di sisi undang-undang dalam mengenakan apa-apa hukuman lain, dan bahawa s 40 Akta tersebut tidak terpakai. Isu adalah sama ada hakim sesyen berjustifikasi dalam melaksanakan budi bicaranya di bawah s 40 Akta tersebut.

Diputuskan, membenarkan rayuan:

Bahagian kedua s 40 Akta tersebut adalah berkaitan dengan mana-mana orang selagi dia berumur lebih 18 tahun dan di bawah 21 tahun pada tarikh perintah demikian dibuat. Dengan mengambil kira fakta-fakta kes yang dirayu, dan memandangkan perayu berumur 20 tahun

sewaktu dipertuduhkan di mahkamah sesyen, bahagian kedua s 40 Akta tersebut terpakai sepenuhnya. Walaupun seorang belia yang berumur lebih 18 tahun boleh dihantar ke penjara, dalam kes-kes di mana mahkamah berpendapat bahawa adalah tidak elok untuk menghantarnya ke penjara, mahkamah sesyen atau majistret kelas pertama dianugerahkan kuasa-kuasa khas dan tambahan untuk bertindak di bawah bahagian kedua s 40 Akta tersebut, dan memerintah pesalah muda demikian supaya ditahan di sebuah Sekolah Henry Gurney sehingga dia mencapai umur 21 tahun, dengan syarat bahawa pada masa perintah dibuat, dia adalah di antara umur 18 tahun dan di bawah 21 tahun. Oleh itu, dalam keadaan-keadaan kes ini, adalah wajar untuk hakim sesyen yang arif bertindak di bawah bahagian kedua s 40 Akta tersebut. Adalah salah untuk mengatakan bahawa, memandangkan sifat mandatori s 376 Kanun tersebut, s 40 Akta tersebut adalah tidak relevan. Justeru itu, s 40 Akta tersebut adalah relevan dan terpakai sekalipun dalam kes-kes di mana hukuman-hukuman pemenjaraan adalah mandatori, andainya keadaan-keadaan kes menjustifikasikannya.

Dalam kes ini, hakim sesyen yang arif berjustifikasi dalam melaksanakan budi bicaranya untuk bertindak di bawah s 40 Akta tersebut dan budi bicara ini tidak harus diganggu (lihat ms 758G–I dan 759A–G); *PP v Yap Huat Heng* [1985] 2 MLJ 414 dibeza.

Per curiam:

Dalam mengenakan pemenjaraan lima tahun untuk berkuatkuasa selepas perayu telah menjalani perintah tahanan, perayu telah dikenakan dua set hukuman yang berbangkit daripada sabitan atas satu pertuduhan dan dengan itu perayu telah 'mengalami hukuman yang lebih dahsyat untuk satu kesalahan daripada yang ditetapkan oleh undang-undang' yang dilarang oleh perkara 7 Perlembagaan Persekutuan (lihat ms 759I dan 760A–B).]

Notes

For cases on the sentencing of youthful offender, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2672–2673.

Case referred to

PP v Yap Huat Heng [1985] 2 MLJ 414 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 173, 294
Federal Constitution art 7
Juvenile Courts Act 1947 s 40
Penal Code (FMS Cap 45) s 376

Appeal from: Criminal Trial No 42–11 of 1994 (High Court, Kuala Lumpur)

A *Gregory Chan* (*Richard Ho* with him) (*Richard Ho & Co*) for the appellant. *Zaitun Zawiyah bte Puteh* (*Kamaruzaman bin Abdul Jalil* with her) (Deputy Public Prosecutors) for the respondent.

Cur Adv Vult

B **Shaik Daud JCA** (delivering the judgment of the court): The appellant was convicted on 24 February 1994 by the Sessions Court Kuala Lumpur of a statutory rape of an underage girl, who was then 15 years 11 months, an offence under s 376 of the Penal Code (FMS Cap 45) ('the Code'). The appellant was then 19 years old, a first offender and he had pleaded C guilty to the charge. In view of his age, the learned sessions court judge called for a probation report on the appellant and after considering the report and the facts of the case, she ordered the appellant to be detained in the Henry Gurney School until he reached the age of 21 years. Although the learned sessions judge did not specifically set out under which provisions D of the law she acted, she presumably did so under s 40 of the Juvenile Courts Act 1947 ('the Act'). The appellant was accordingly sent to the Henry Gurney School and he served his detention there until he reached 21 years of age and was released on 16 January 1995. In the meantime, the Public Prosecutor being dissatisfied with the sentence imposed by the sessions court, filed a notice of appeal to the High Court on 3 March 1994. E Unfortunately, the appeal was never heard promptly as it should have been, but was heard on 27 November 1995, by which date the appellant had been released from the Henry Gurney School.

The learned judge allowed the appeal, set aside the order of the sessions court, and imposed the minimum term of imprisonment of five F years as provided by s 376 of the Code, which term was to commence from the date of the order, that is 27 November 1995. The learned judge was of the view that pursuant to the mandatory provision of the s 376 of the Code, the sessions court was wrong in law to impose any other sentence, and that s 40 of the Act has no relevance.

G The learned sessions judge took into consideration the facts of the case, the probation report on the appellant, the fact that he pleaded guilty and was a first offender and also the serious nature of the offence and she concluded in her grounds of judgment as follows:

> H Walaupun apa yang telah dilakukan oleh tertuduh adalah sesuatu yang serius yang tidak sepatutnya dimaafkan, mahkamah berpendapat hukuman minima jika disabitkan dengan kesalahan merogol iaitu lima tahun penjara adalah berat bagi tertuduh. Tertuduh dalam usianya yang muda seharusnya diberi peluang untuk memperbaiki dirinya. Dengan menghantarkannya ke penjara dalam usia yang begitu muda tidak akan mendatangkan apa-apa kebaikan kepada tertuduh, malahan akan mendatangkan kemudaratan I kepadanya.

In view of what she had said above, the learned sessions judge, while appreciating the serious nature of the offence, was of the view that in the circumstances of the case, it would be more appropriate to have the

appellant detained in the Henry Gurney School until he reached the age of 21 years. A

The issue before this appeal is whether s 40 of the Act is applicable in cases of this nature. This section confers special powers of the juvenile court on the High Court, a sessions court and a court of a magistrate of the first class in respect of juveniles and persons of 18 years and under 21 years. It provides that: B

> Nothing in this Act other than sections 15 and 16 shall affect the powers of the High Court and all the powers which may be exercised under this Act by a juvenile court in respect of a juvenile offender may in like manner be exercised by the High Court; and, in addition, the High Court, a sessions court and a court of magistrate of the first class shall have power to order the detention, in a Henry Gurney School, up to but not after his attainment of the age of 21 years, of any person who has attained the age of 18 years but has not attained the age of 21 years at the date of making such order. C

On our reading of this section, we find that there are two limbs to it. The first limb provides that the section does not affect the powers of the High Court and all powers which may be exercised under the Act by a juvenile court in respect of a juvenile offender may in the like manner be exercised by the High Court. The word 'juvenile' here must mean juvenile as defined in s 2 of the Act to mean 'a person who has attained the age of seven years and is under the age of 18'. The second limb of the section confers upon the High Court, a sessions court and a court of a magistrate of the first class powers to order detention in a Henry Gurney School, up to but not after his attainment of the age of 21 years, of *any person* who has attained the age of 18 years but has not attained the age of 21 years at the date of making such order. It seems clear to us that the second limb is an additional power under the section conferred on the High Court, a sessions court and a court of the magistrate of the first class to order the detention of any person, not confined to a juvenile as in the first limb. Therefore, on a proper reading of the second limb of s 40 of the Act, we are of the view that it relates to any person as long as he is above 18 years and under 21 years at the date of the making of such order. Taking into consideration the facts of the present case on appeal, and since the appellant was 20 years old when he was charged in the sessions court, we are of the view that the second limb of s 40 of the Act squarely applies to him. We are of the view that although a youth above the age of 18 can be sent to prison, in cases where the court is of the view — after considering all relevant factors pertaining to that particular case — that it would be undesirable to send him to prison and to expose him to hardened criminals, a sessions court or a magistrate of the first class is conferred with special and additional powers to act under the second limb of s 40 of the Act, and order such youthful offenders to be detained in a Henry Gurney School until he attained the age of 21 years, provided that at the time of the making of the order, he was between the ages of 18 years and below 21 years. We are, therefore, of the view that, in the circumstances of this case, it was proper for the learned sessions judge to act under the second D E F G H I

limb of s 40 of the Act. She came to this conclusion after considering every aspect of the case. In our view, it would be wrong to say that, in view of the mandatory nature of s 376 of the Code, s 40 of the Act is irrelevant. We hold that s 40 of the Act is relevant and applicable even in cases where sentences of imprisonment is mandatory, provided the circumstances of the case justify it. When imposing the five-year sentence, the learned judge cited the case of *PP v Yap Huat Heng* [1985] 2 MLJ 414, also a case of rape committed by a young offender. In that case I had the occasion, as a High Court judge, to say that in specific cases the courts should not place too much emphasis on the fact that the offender was young and a first timer but public interest demands that in such cases a deterrent sentence be imposed. The facts of that case are distinguishable. There, the respondent committed rape on two very young sisters and in the course of committing the rape, violence was used and he also robbed them of their meagre jewelleries at knife point. He was convicted on two charges of rape and two charges of armed robbery. The facts of the present case are far different.

There are elements of consent by the complainant, although this is not relevant in view of her age. The facts also showed that she did not report the incident to anyone until her father threatened her. A medical examination of the complainant on the same day revealed that she was suffering from a venereal disease which further suggests that she must have indulged in sexual activities before this particular incident. Having considered all these, the learned sessions judge rightly came to the conclusion that it would be appropriate and in his best interest to order the appellant to be detained under the second limb of s 40 of the Act.

The learned senior federal counsel appearing for the respondent — while conceding that s 40 of the Act is applicable to convictions under s 376 of the Code, just as the provisions of ss 173 and 294 of the Criminal Procedure Code (FMS Cap 6) — questions whether the facts of the present case justify the learned sessions judge to act under s 40 of the Act. We are of the view that after considering the facts of this case, we agree that the learned sessions judge was justified to exercise her discretion to act under s 40 of the Act and we feel that this discretion ought not to be disturbed.

Before leaving this matter, we would like to touch on one other aspect of this case. As we stated earlier, when the learned judge imposed the five years imprisonment, the appellant had been released from the Henry Gurney School and was in fact a free person for a period of ten months. He had, therefore, served the order imposed by the sessions judge. In our view, when the learned judge imposed a sentence of imprisonment of five years from the date of the appeal, he may have violated the second limb of art 7 of the Federal Constitution.

Article 7 provides that:

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, *and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.*

In imposing the five years' imprisonment to take effect from 27 November 1995 after the appellant had served the order of detention, the appellant had, more or less, been imposed two sets of sentences from a conviction upon one charge, and the appellant had, therefore, 'suffered a greater punishment for an offence than was prescribed by law'. Although the learned judge said that he took into consideration the time spent in the Henry Gurney School, this to our mind, is not reflected in the sentence which took effect from the date of the appeal.

For the above reasons, we are of the view that, in the circumstances of this case, the learned judge sitting in an appellate position ought not to have interfered with the discretion of the learned sessions judge. We allowed the appeal, set aside the sentence of five years' imprisonment, and ordered the appellant to be released forthwith.

Appeal allowed.

Reported by David Lai